

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In re)
)
Amendment of Section 73.202(b)) MM Docket No. 99-215
TABLE OF ALLOTMENTS,) RM-9337
FM BROADCAST STATIONS)
(Mason, Texas))

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Chief, Allocations Branch,
Policy and Rules Division, Mass Media Bureau

COMMENTS

Foxcom, Inc. (*Foxcom*) hereby files its Comments in response to the Notice of Proposed Rule Making (NPRM), 64 Fed. Reg. 33237 (published June 22, 1999), in the instant proceeding.

I. BACKGROUND

1. BK Radio, the petitioner in this proceeding, has applied for Channel 249C2 at Mason, Texas. See File No. BPH-960823MF. Foxcom has also applied for Channel 249C2 at Mason. See File No. BPH-960826MH. So have Jayson D. and Janice M. Fritz. See File No. BPH-960826MS. All three applicants are thus competing for a Class C2 facility at Mason. Unless the mutual exclusivity is broken, the Commission will send the three parties to an auction. Implementation of Section 309(j) of the Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, First Report and Order in MM Docket No. 97-234, GC Docket No. 92-52, and Gen Docket No. 90-264, 13 FCC Rcd 15920 (1998), recons., Memorandum Opinion and Order, 64 Fed. Reg. 24523 (published May 7, 1999).

2. BK obviously -- and understandably -- does not want to participate in an auction. So, BK has petitioned for the allotment of Channel 239C2 to Mason, Texas, as a second local

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FM broadcast service.¹ BK would amend its application to specify Channel 239C2 in place of Channel 249C2, without loss of its cut-off status. The NPRM proposes to make the allotment.

3. BK claims that the Commission can give Channel 273C2 to either Foxcom or the Fritzes, and the other can have Channel 249C2. BK Radio further claims that the Commission can also allot both Channel 245C2 and Channel 288C2 to Mason. BK urges adoption of its proposal, arguing that resolving the current mutual exclusivity would further the public interest, and citing Albion, Nebraska, 10 FCC Rcd 3183 (1995).

4. The NPRM recognizes that the FCC can allot Channel 239C2 to Mason. NPRM at n. 2. The NPRM properly rejects BK's claims that Channel 245C2 and Channel 288C2 would also satisfy the Commission's technical allotment standards. (BK advances these alternative channels to satisfy any other expressions of interest, or for either Foxcom or the Fritzes.) Id. at n. 3. BK's Comments, however, assert that Channel 288C2 is available for use at Mason, and include a contour map and spacing study to that effect.

II. ARGUMENT

5. BK is wrong: Channel 288C2 at Mason fails the second of the FCC's basic two-pronged test for technical acceptability. A technically viable allotment must have an at least theoretically available and buildable reference point that must: (a) be fully spaced; and (b) provide full city-grade coverage of the community of license. See, e.g., Key West, Florida, 3 FCC Rcd 6423 (1988); Greenwood, Seneca, Aiken and Clemson, South Carolina and Biltmore Forest, North Carolina, 63 Rad. Reg.(P&F) 2d 251 (1987).

6. The reference point in question is: North Latitude 30° 42' 04"; West Longitude 99° 35' 07". BK's comments include a spacing study to the effect that this reference point is

¹ BK Radio first sought the allotment of Channel 273C2. On January 5, 1999, BK asked for Channel 239C2 instead of Channel 273C2.

fully spaced. Foxcom does not dispute that this reference point is fully spaced. BK also purports that a Class C2 facility operating at this site would satisfy the city-grade coverage requirement, and its Comments include a contour map to this effect. Here is where BK errs. The city-grade contour that BK has depicted is irregularly shaped and roughly ovoid. BK has obviously based this contour on the actual elevations of the theoretical antenna's radiation center above the terrain along an unspecified number of radials running from the reference point. However, in the allocations context (except in a very limited circumstance not pertinent here), the FCC does not consider the effects of actual terrain in determining where the city-grade contour would fall. Rather, the FCC assumes a circular city-grade contour based on flat terrain. See, e.g., Fort Bragg, California, 6 FCC Rcd 5817 (1991) at n.1; Broken Arrow and Bixley, Oklahoma and Coffeerville, Kansas, 3 FCC Rcd 6507 (1988).

7. As Exhibit A, the Technical Statement of John Furr, Fox's technical consultant, demonstrates, the reference point is 34.3 km Southwest of the reference coordinates of Mason. The standard distance to a Class C2 facility's city-grade contour is only 32.6 km. Thus, it is impossible for the hypothetical Class C2 facility at the reference point to serve the center of, indeed, all of, Mason. The Channel 288C2 allotment that BK champions is thus technically defective at the most basic level.

8. BK's desire to avoid having to pay for the awarding of a unique and valuable public franchise is totally understandable from a private-business-interest perspective. By contrast, the public treasury's receipt of funds from any auction of the right to construct a Class C2 to serve Mason is clearly a public-interest benefit. Indeed, in this light, the continued vitality of the Albion, Nebraska doctrine is, to say the least, highly questionable. The FCC fashioned Albion relief to expedite service to the public and to allow the Agency to avoid devoting its

scarce resources to time-consuming comparative hearings. Now that comparative broadcast proceedings are a thing of the past, and now that the Agency will henceforth choose broadcast permittees using the efficient and revenue-raising auction mechanism, Albion is an idea whose time has come and gone. Foxcom says this knowing full well that it may well be Foxcom's funds which enrich the public treasury, as Foxcom intends to bid earnestly for the Class C2 franchise.

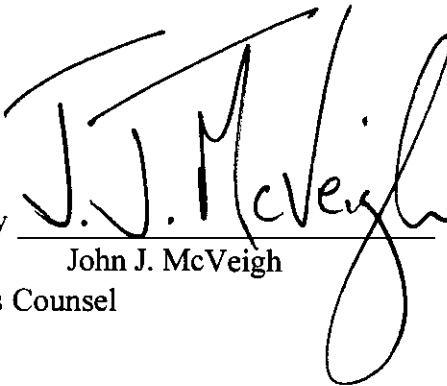
9. Finally, Foxcom is unalterably opposed to an outcome in which BK gets a Class C2 channel for free while Foxcom needs to bid against the Fritzes for a facility of the same Class. Such a result would be both a violation of equal protection (see Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C. Cir. 1965)), and unconscionably inequitable.

CONCLUSION

Based on the foregoing, Foxcom, Inc. respectfully asks the FCC to reject BK's proposal.

Respectfully submitted,

FOXCOM, INC.

By 
John J. McVeigh
Its Counsel

John J. McVEIGH,
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Date: August 2, 1999

EXHIBIT A

ALLOCATION STATEMENT

This statement is prepared on behalf of Foxcom, Inc. This is a challenge to BK Radio's proposal in the proceeding of Mason, Texas. Foxcom Inc. is an applicant for Channel 249C2 in Mason, Texas. BK Radio seeks to revive Channel 288C2 stated in MM Docket 97-244. This proceeding is a separate consideration from that docket and Foxcom seeks to show that the allocation has been removed from the database and it will not meet the FCC's standards for an alternate channel for Mason, Texas.

The reference coordinates of Mason Channel 288C2 were:

Latitude 30°42'04" North. Longitude 99°35'07" West

This site is 34.4 kilometers southwest (261° True) of the reference coordinates of Mason, Texas. The distance to the 70 dBμ contour is 32.6 km in accordance with the Rulemaking procedure. Therefore it is impossible to serve the center city, much less the entire city, of Mason with the 70 dBμ contour as required by §73.315(a) and §73.315(b) of the FCC Rules. This contour is shown in Exhibit A.

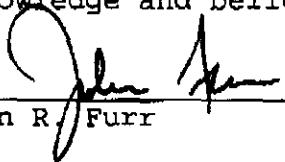
In the BK comments dated July 28, 1977, an exhibit was shown with the city grade contour covering the entire city of Mason. This exhibit was prepared using the terrain calculations of §73.313 and FCC F(50,50) curves. Therefore, it was for good reason that the FCC deleted the proposed assignment from the computer database.

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COMMUNICATIONS
CONSULTANTS

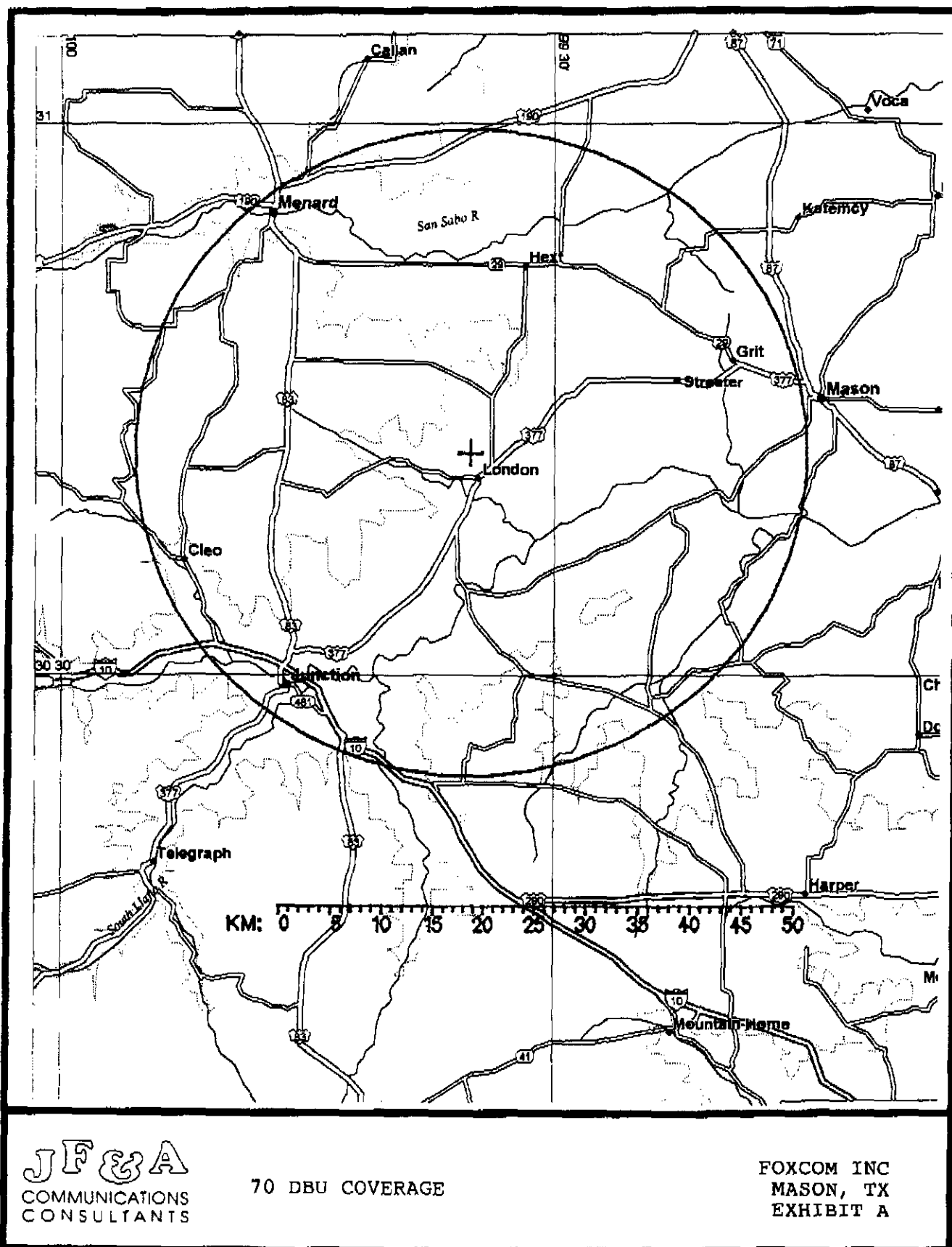
FOXCOM INC
MASON, TX
NARRATIVE

I, John R. Furr, am a Communications Consultant and I represent Foxcom, Inc. My qualifications are a matter of record with the Commission. All statements made herein are true and correct to the best of my knowledge and belief.

July 30, 1999



John R. Furr

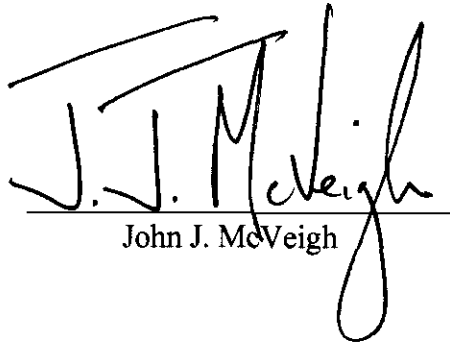


CERTIFICATE OF SERVICE

I hereby certify that I have, this Second day of August, 1999, sent copies of the foregoing **COMMENTS**, by first-class United States mail, postage prepaid, to:

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